

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HUSCH BLACKWELL LLP  
750 17<sup>th</sup> Street, N.W, Suite 900  
Washington, DC 20006

Plaintiff,

v.

Civil Action No. \_\_\_\_

UNITED STATES SMALL BUSINESS  
ADMINISTRATION

SERVE: Civil Process Clerk  
Office of the United States Attorney  
for the District of Columbia  
441 4th Street NW  
Suite 1100 South  
Washington, D.C. 20001

SERVE: The Honorable William Barr  
United States Attorney General  
Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

SERVE: Office of General Counsel  
U.S. Small Business Administration  
409 3rd Street SW  
Washington, DC 20416

and

UNITED STATES DEFENSE LOGISTICS  
AGENCY

SERVE: Civil Process Clerk  
Office of the United States Attorney  
for the District of Columbia  
441 4th Street NW  
Suite 1100 South  
Washington, D.C. 20001

SERVE: The Honorable William Barr

United States Attorney General )  
Department of Justice )  
950 Pennsylvania Avenue, NW )  
Washington, DC 20530 )  
)  
SERVE: Office of General Counsel )  
U.S. Defense Logistics Agency )  
8725 John J. Kingman Road )  
Fort Belvoir, VA 22060 )  
)  
Defendants. )

### **COMPLAINT**

Plaintiff Husch Blackwell LLP (“Husch Blackwell”), states the following for its Complaint against Defendants United States Small Business Administration (the “SBA”) and the Defense Logistics Agency (the “DLA”) (collectively, the “Agencies”):

1. This is an action by a requester seeking the release of agency records under the Freedom of Information Act (“FOIA”). 5 U.S.C. § 552(a).

2. Jurisdiction and venue in the District of Columbia are proper under the FOIA. 5 U.S.C. § 552(a)(4)(B).

3. The SBA is an independent federal agency and is an “agency” as defined in the FOIA. 5 U.S.C. § 552(f). Upon information and belief, the SBA has possession of and control over records that Husch Blackwell seeks in this action.

4. DLA is a component of the United States Department of Defense and is an “agency” as defined in the FOIA. 5 U.S.C. § 552(f). Upon information and belief, DLA has possession of and control over records that Husch Blackwell seeks in this action.

**Plaintiff's Requests to Defendant SBA**

5. By request dated November 6, 2018, submitted via facsimile in accordance with the SBA's published FOIA procedures, Husch Blackwell requested copies of "[t]he individual waiver for the non-manufacturer rule issued in connection with [Solicitation No.SPE8E318R0010, a/k/a the CENTCOM Solicitation]," and "all documents relied on by the SBA in approving the non-manufacturer rule waiver for the Solicitation." A copy of the November 6, 2018 FOIA request is attached as **Exhibit A**.

6. By request dated November 15, 2018, submitted electronically in accordance with the SBA's published FOIA procedures, Husch Blackwell requested copies of "the waiver for the non-manufacturer rule issued for Solicitation SPM8EH16R0001, Fire and Emergency Services, and the documents relied on by the SBA in approving the waiver." A copy of the November 15, 2018 FOIA request is attached as **Exhibit B**.

7. By requests dated December 3, 2018, submitted electronically in accordance with the SBA's published FOIA procedures, Husch Blackwell requested copies of the following:

- A. "The waiver for the non-manufacturer rule issued for Solicitation No. SAQMMA15R0183," and "the DD2578 Small Business Coordination Record for Solicitation No. SAQMMA15R0183;"
- B. "The waiver for the non-manufacturer rule issued for Solicitation No. FA489016R0031, which is the solicitation for the Internet-Based Contractor Operated Parts Store," and "the DD2578 Small Business Coordination Record for Solicitation No. FA489016R0031, which is the solicitation for the Internet-Based Contractor Operated Parts Store;"

- C. “The waiver for the non-manufacturer rule issued for Solicitation No. FA469016R0004, which is the solicitation for Contractor Operated Civil Engineering Supply Store at Ellsworth AFB, SD,” and “the DD2579 Small Business Coordination Record for Solicitation No. FA469016R0004, which is the solicitation for the Contractor Operated Civil Engineering Supply Store at Ellsworth AFB, SD;”
- D. “The non-manufacturer rule waiver issued for Solicitation No. FA283514R0033, which is the AEC Contractor Operated Civil Engineering Supply Store solicitation,” and “the DD2579 Small Business Coordination Record for Solicitation No. FA283514R0033, which is the AEC Contractor Operated Civil Engineering Supply Store solicitation;”
- E. “The non-manufacturer rule waiver issued for Solicitation No. N0018918R0003, which is the Norfolk Super Servmart solicitation,” and “the DD2579 Small Business Coordination Record for Solicitation No. N0018918R0003, which is the Norfolk Super Servmart solicitation;”
- F. “The non-manufacturer rule waiver issued for Solicitation No. N0018918R0007, which is the Logistics Support Services (3PL) solicitation for Crane, IN,” and “the DD2579 Small Business Coordination Record for Solicitation No. N0018918R0007, which is the Logistics Support Services (3PL) solicitation for Crane, IN;” and
- G. “The non-manufacturer rule waiver issued for Solicitation No. N0018917R0026, which is the Logistics Support Services (3PL) solicitation for Great Lakes, IL,” and “the DD2579 Small Business

Coordination Record for Solicitation No. N0018917R0026, which is the Logistics Support Services (3PL) solicitation for Great Lakes, IL.”

Copies of the December 3, 2018 FOIA requests are attached as **Exhibit C**.

8. By request dated December 17, 2018, submitted electronically in accordance with the SBA’s published FOIA procedures, Husch Blackwell requested a copy of “the Non-Manufacturer Waiver issued in connection with Solicitation No. SPM8EG-13-R-0005.” A copy of the December 17, 2018 FOIA request is attached as **Exhibit D**.

**Plaintiff Submitted FOIA Requests to Defendant DLA**

9. By request dated October 25, 2018, submitted via facsimile in accordance with DLA’s published FOIA procedures, Husch Blackwell requested copies of the following:

- “The individual waiver for the non-manufacturer rule issued in connection with [Draft Solicitation No. SPE8EJ18R0001DRAFT].”
- “All documents relied on by the Contracting Officer in approving the non-manufacturer rule waiver for [Draft Solicitation No. SPE8EJ18R0001DRAFT].”
- “All documents created, reviewed, or relied upon by DLA procurement officials in assessing whether [Draft Solicitation No. SPE8EJ18R0001DRAFT] should be set aside for small business or conducted on an unrestricted basis.”
- “The DD2579 Small Business Coordination Record pertaining to the Draft Solicitation.”

A copy of the October 25 FOIA request is attached as **Exhibit E**.

10. By request dated November 6, 2018, submitted via facsimile in accordance with DLA's published FOIA procedures, Husch Blackwell requested a copy of the DD2579 Small Business Coordination Record pertaining to Solicitation Number SPE8E318R0010 (a/k/a the CENTCOM Solicitation). A copy of the November 6 FOIA request is attached as **Exhibit F**.

11. By requests dated November 15, 2018, submitted electronically in accordance with DLA's published FOIA procedures, Husch Blackwell requested copies of the following:

- A. "The waiver for the non-manufacturer rule issued for Solicitation SPE30017R0054, Full Service Food Support for DLA Troop Support OCONUS Guam Area, and the documents relied on by the SBA in approving the waiver."
- B. "The waiver for the non-manufacturer rule issued for Solicitation SPM8EJ13R0001 (or new number SPE8EJ18R0001DRAFT), DLA Special Operational Equipment Tailored Logistics Support Solicitation, and the documents relied on by the SBA in approving the waiver."

Copies of the November 15 FOIA requests are attached as **Exhibit G**.

12. By request dated December 13, 2018, submitted electronically in accordance with DLA's published FOIA procedures, Husch Blackwell requested copies of the following contracts, including all contract modifications to each contract: SPE5B114D0003; SPE5B114D0002; SPE8E315D0029; SPM8E314D0001; SPE8E314D0002; SPM8E314D0003; SPE5B115D0002; SPE5B115D0001; SPE8E314D0001; SPM8EG14D0001; SPE8E318D0003; SPE8E318D0001; SPE8E315D0033; SPE8E315D0032; SPE8E315D0024; SPE8E315D0016; SPE8E315D0017; SPE8EG14D0010; SPE8EG14D0011; SPE8E315D0015; and SPE8E315D0014. A copy of the December 13 FOIA request is attached as **Exhibit H**.

13. By request dated January 25, 2019, submitted in accordance with DLA's published FOIA procedures, Husch Blackwell re-requested copies of the following contracts, including all contract modifications to each contract: SPE5B114D0003; SPE5B114D0002; SPE8E315D0029; SPM8E314D0001; SPE8E314D0002; SPM8E314D0003; SPE5B115D0002; SPE5B115D0001; SPE8E314D0001; SPM8EG14D0001; SPE8E318D0003; SPE8E318D0001; SPE8E315D0033; SPE8E315D0032; SPE8E315D0024; SPE8E315D0016; SPE8E315D0017; SPE8EG14D0010; SPE8EG14D0011; SPE8E315D0015; and SPE8E315D0014. A copy of the January 25 FOIA request is attached as **Exhibit I**.

**Defendants DLA's and SBA's Failure to Timely Comply with Plaintiff's Requests**

14. To date, the SBA has only responded to two of Husch Blackwell's FOIA requests, which were both submitted November 15, 2018.

15. In response to the November 15, 2018 request (**Exhibit G**) for a copy of "the waiver for the non-manufacturer rule issued for Solicitation SPM8EJ13R0001 (or new number SPE8EJ18R0001DRAFT), DLA Special Operational Equipment Tailored Logistics Support Solicitation, and the documents relied on by the SBA in approving the waiver," the SBA produced only one document.

16. In response to the November 15, 2018 request (**Exhibit G**), a representative of the SBA sent Husch Blackwell a copy of the waiver for the non-manufacturer rule issued for Solicitation SPM8EJ13R0001 (or new number SPE8EJ18R0001DRAFT). The SBA did not produce the DLA Special Operational Equipment Tailored Logistics Support Solicitation, or the documents relied on by the SBA in approving the waiver. *See* SBA Email Regarding FOIA Response, attached as **Exhibit J**. Thus, the SBA's response was incomplete.

17. In response to the November 15, 2018 request (**Exhibit B**) for “the waiver for the non-manufacturer rule issued for Solicitation SPM8EH16R0001, Fire and Emergency Services, and the documents relied on by the SBA in approving the waiver,” the SBA responded that it did not locate the requested records. *See* Email Correspondence between the SBA and Husch Blackwell, attached as **Exhibit K**. The SBA informed Husch Blackwell of its right to appeal the SBA’s response. Should Husch Blackwell challenge the response referenced in this Paragraph, any such challenge will be made through SBA’s administrative system.

18. On December 6, 2018, the SBA requested more information from Husch Blackwell allegedly required for the SBA to respond to each of Husch Blackwell’s requests. On December 7, 2018, Husch Blackwell promptly provided the SBA with the requested information. *See* December Email Correspondence between the SBA and Husch Blackwell, attached as **Exhibit L**.

19. On February 19, 2019, the SBA requested more information from Husch Blackwell allegedly required for the SBA to respond to each of Husch Blackwell’s requests. On February 19, 2019, Husch Blackwell promptly provided the SBA with the requested information. *See* February Email Correspondence between the SBA and Husch Blackwell, attached as **Exhibit M**.

20. On February 19, 2019, Husch Blackwell and a representative of the DLA discussed via email the status of Husch Blackwell’s FOIA requests. The DLA representative stated that FOIA response times are only “suggested” to be within 30 days for complex requests. She further stated, “That number gives no consideration to workloads for the FOIA officer or subject matter expert nor does that number consider the amount of items, pages or specific



difficulty of responding to an individual response.” *See* Email Correspondence between the DLA and Husch Blackwell Regarding Status of Requests, attached as **Exhibit N**.

21. To date, the SBA has only responded to two of Husch Blackwell’s FOIA requests. The SBA produced the document referenced in Paragraph 16 (**Exhibit J**), which was only one of several documents responsive to the particular FOIA request to which the SBA was responding. The SBA has not produced documents responsive to Husch Blackwell’s remaining FOIA requests. Further, any challenge to SBA’s response that it could not locate responsive documents, will be made by Husch Blackwell through the SBA’s administrative system.

22. To date, the DLA has not produced documents responsive to any of Husch Blackwell’s FOIA requests.

23. One hundred thirty three days have passed since Husch Blackwell’s first request submitted on October 25, 2018. Forty one days have passed since Husch Blackwell’s final FOIA request submission.

24. Pursuant to the FOIA, an agency must determine within 20 working days whether to comply with a FOIA request and immediately notify the requester of the determination, the reasons for the determination, and the requester’s right to appeal. 5 U.S.C. § 552(a)(6)(A)(i).

25. Pursuant to the FOIA, an agency may have an additional 10 days to respond to a FOIA request if the agency provides a timely written notice to the requester. 5 U.S.C. § 552(a)(4)(A)(viii)(II)(aa).

26. Pursuant to the FOIA, a requester is deemed to have exhausted his administrative remedies with respect to the request if the agency fails to comply with applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i).

27. With the exception of the SBA's response to Husch Blackwell's November 17, 2018 FOIA request (**Exhibit K**) the Agencies failed to comply with the time limits set forth in the FOIA and in the Agencies' published regulations.

28. Over 20 working days have passed since all of Husch Blackwell's submissions of FOIA requests. As of March 8, 2019, the SBA has only produced one document responsive to one of Husch Blackwell's FOIA requests, and DLA has not produced any documents responsive to Husch Blackwell's FOIA requests.

29. As of March 8, 2019, with the exception of the SBA's response to Husch Blackwell's November 15, 2018 request, neither of the Agencies had advised Husch Blackwell of an intention to withhold documents responsive to Husch Blackwell's requests or reasons for not responding to Husch Blackwell's unanswered requests, and neither Agency had advised Husch Blackwell of its right to appeal any determination that a response is not required.

30. The Agencies have not given written notice that additional time would be required to respond to Husch Blackwell's FOIA requests and have not asserted that exceptional or unusual circumstances would justify an extension of the statutory deadlines.

31. Even if the Agencies were permitted an additional 10 days under the FOIA due to exceptional or unusual circumstances, the 10-day extension has also passed. Forty days have passed since Husch Blackwell's last request.

32. Husch Blackwell has a statutory right to the requested records, and there is no legal basis for the Agencies' refusal to disclose the requested records. All administrative remedies available under the FOIA have been exhausted.

33. The FOIA permits the Court to assess reasonable attorney fees and other litigation costs reasonably incurred by a requester in any action seeking the release of agency records in which the requester substantially prevails.

WHEREFORE, Husch Blackwell respectfully requests that the Court:

- A. Order the Agencies to perform a reasonable search for records responsive to Husch Blackwell's FOIA requests;
  - B. Examine the contents of the agency records in camera to determine whether such records or any part thereof may be withheld;
  - C. Declare that the Agencies' refusal to disclose the requested records is unlawful;
  - D. Order the Agencies to expeditiously make the requested records available;
  - E. Order all search and duplication fees waived;
  - F. Assess reasonable attorney fees and other litigation costs incurred by Husch Blackwell in this action; and
- Grant such other and further relief that may be appropriate.

**DATED** this 8<sup>th</sup> day of March 2019.

Respectfully submitted,

/s/ Brian P. Waagner  
Brian P. Waagner (D.C. Bar No. 450823)  
Tierra S. Jones (*pro hac vice* forthcoming)

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